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IN THE

Supreme Court of the United States

October Term, 1965.

No. 26.

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,
Respondents.

BRIEF FOR RESPONDENTS THE UNITED GAS IMPROVEMENT COMPANY AND LONG ISLAND LIGHTING COMPANY.

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BRIEF FOR RESPONDENTS THE UNITED GAS IMPROVEMENT COMPANY AND LONG ISLAND LIGHTING COMPANY.

COUNTER-STATEMENT OF THE QUESTION INVOLVED.

Does the Natural Gas Act authorize the Federal Power Commission to exercise its conditioning power under § 7 so as to protect the consumer from past Commission error as to price level, corrected on court review before the erroneous action had become final under § 19, by requiring disgorging of excesses collected by producers above the price required by the public convenience and necessity?

COUNTER-STATEMENT OF THE CASE.

Ocean Drilling & Exploration Company (ODECO), Petitioner in No. 26, executed contracts with Hope Natural Gas Company (Hope) an interstate pipeline company, on October 23, 1958, and December 13, 1958, for the sale of natural gas in interstate commerce from the Block 4 Field of the East Cameron Area and from the Bayou Pigeon Field in South Louisiana. The contract initial price for this gas was 23.55¢ per Mcf (R. 538). ODECO applied for certificates of public convenience and necessity under § 7 of the Natural Gas Act and its application was consolidated with those of other producers and heard. After this first hearing the Commission erroneously granted unconditional certificates to ODECO at the high price levels (R. 116-41). The Public Service Commission of the State of New York, representing consumer interests, petitioned for rehearing (R. 142-52), and when this was denied, appealed to the Court of Appeals for the District of Columbia. That court reversed, holding that the Commission erred in issuing the unconditioned certificate. It said:

> "As one solution [on remand], 'the Commission in the exercise of its discretion might attach such conditions as it believes necessary' to protect the public interest while other rate testing procedures are in process. [citing *Atlantic Ref. Co. v. Public Service Comm'n,* 360 U. S. 378, 391]." *Public Service Comm'n v. FPC,* 287 F. 2d 146, 149 (D. C. Cir. 1960).

ODECO, on remand, again sought the issuance of the certificate required under Section 7 for it lawfully to make its sales of natural gas in interstate commerce. The Commission after hearings on remand exercised its discretion to attach conditions to certification requiring (1) an initial price per Mcf of 20¢ (including tax reimbursement) and (2) refund of all amounts collected by ODECO in excess of

the 20¢ level, found to be the appropriate public-convenience-and-necessity price at which the gas should enter the interstate market (R. 549-93, 606-17). Other preliminary procedural orders dealing with ODECO's application, *en masse* with those of other producers are found at R. 395-405, 409-22, 428-30, 447-51 and 491-540 (Examiner's decision).

Beyond these general orders and opinions, the record presented to this Court in No. 26 contains no facts, either substantive or procedural, pertaining to ODECO's individual applications or contractual arrangements.

Further background relevant to the appeal in No. 26 is set forth in the Statement of the Case in the Brief for Petitioners, The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company in their consolidated appeal in No. 21.

On appeal by ODECO to the Court of Appeals for the Fifth Circuit the court upheld the power of the Commission to impose the refund condition, albeit substituting its own "open end" refund formula for the initial public convenience and necessity rate standard used by the Commission. ODECO's petition to this Court in No. 26 questions the power Section 7 confers on the Commission.

ARGUMENT.

Section 7 of the Natural Gas Act Confers on the Commission the Authority, Exercised Here, to Condition the Issuance of a Permanent Certificate at the Appropriate Price on the Producer's Returning Excess Charges Previously Collected Under Invalid, Court Reversed Certificates.

The original § 7(c) of the Natural Gas Act provided that it was "the intention of Congress that natural gas should be sold in interstate commerce for resale for ultimate public consumption . . . at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." 52 Stat. 825. Construing this expression of Congressional intent, this Court has held that § 7, even as subsequently amended, and the whole Act as well were "so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378, 388. And such consumer protection must "be *from the time the gas first enters interstate commerce.*" *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677, 679 (D. C. Cir. 1963). (Emphasis added.)

The present petition of ODECO in No. 26 raises the special question of the application of these unequivocal principles to a proceeding in which the Commission, attempting to discharge its duty under § 7 of the Act to determine the appropriate initial price, commits error at one stage of the hearing—but, before its action becomes final under § 19, a timely appeal leads to reversal of the error. Obviously when the Commission properly performs its duties under the Natural Gas Act, it offers the sort of consumer protection contemplated by the Act and required by this Court. When it errs, however, two distinct threats to the consumer interest arise. The first is the substantive

error itself. That can only be corrected by an immediate appeal to the courts under § 19 of the Act, to reverse the erroneous action, and such an appeal was taken in the present case, laying bare the Commission's error. *Public Service Comm'n v. FPC*, 287 F. 2d 146 (D. C. Cir. 1960).

The second threat arises from the procedural delay inevitably caused by the mechanical process of correcting error through court appeal. This delay may, as in the present case, consume several years. The question raised by Petitioner in No. 26, therefore, is whether the fact of procedural delay can be allowed under § 7 to have adverse substantive impact upon consumers.

The novel thesis which lies at the base of ODECO's brief to this Court may be boiled down to the following: § 7 affords consumers "a complete, permanent and effective bond of protection from excessive rates and charges" only if and when the Commission performs without error its regulatory function with respect to the initial price of gas in interstate commerce—but should the Commission err (as shown on timely court appeal), the producer may retain any windfall which the inevitable procedural delay may generate at the expense of the consumer. In short, ODECO says that the Commission should protect the consumer—except when it fails to protect the consumer!

ODECO seeks to bolster this self-defeating construction of the Act by advancing a "sporting" theory of protecting the public interest. Thus it would make protection dependent upon the procedural skill of the legal counsel to various intervenors and would elevate the stay provision in § 19, the presence of which is explained by the protection it offers individual company respondents, to the status of a lodestar of Congressional intent to give producers the full substantive advantage of procedural delay.[1] Such an

1. Such a view ignores the fact that, while an individual company respondent may be bound by its own legal maneuvers, the public interest far exceeds and overrides the interest of any "consumer representative" intervenor. Thus, such a view would make consumer protection depend upon the ability of a petitioner to the court of

interpretation is directly contrary to the affirmative Congressional intent frequently interpreted by this Court. It is precisely when the Commission errs that the consumer most needs that protection of which this Court has spoken. The presumption implicit in the affirmative powers granted by § 7—that the Commission will exercise them properly—must be read in the light of this Congressional intent *fully* to protect the consumer. The presumption carries no negative implication that Congress intended to give the regulated company the sporting advantage of all error.

Whether the Commission acts correctly initially, or only after a reversal by the Court of Appeals, the issue before it in a § 7 proceeding remains the same—the appropriate price at which the gas is *initially* to enter the interstate market. There is no basis in the Act or in the cases for ODECO's argument at page 12 of its brief that the proper issue is the appropriate price at which such gas should be sold *after* the Commission has decided all § 7 issues correctly. The statutory limitation to prospective action only, under § 5 of the Act, takes effect only after the producer has obtained a valid, final permanent certificate no longer subject to court review. Prior thereto the producer who attempts to proceed under a certificate not final under § 19 and challenged by court appeal acts at its

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appeals to convince a court that the "extraordinary relief" of a stay is required. For obviously, the same legal result must follow in the case where counsel feels the court would not grant a stay and he therefore does not apply for one, as in the case where the application is made but denied. Under ODECO's theory, if the individual petitioner failed, in the ten to fifteen minutes without record usually allotted to motions for stays, to convince the court that petitioner would prevail on appeal, the admitted interest of all consumers would be automatically sacrificed. For if petitioner fails to make such a showing he is not entitled to a stay. *Virginia Petroleum Jobbers Ass'n v. F. P. C.*, 259 F. 2d 921 (D. C. Cir. 1958). Subsequently, however, on a fuller argument the petitioner might be able to demonstrate to the court on the record the Commission's error. The producer, in contrast, had full power to delay sale of the gas until it received a permanent certificate not subject to court review. See footnote 4, *infra*.

peril, the same as any litigant who relies upon a lower court judgment, while review is pending. *Cf. Public Service Comm'n v. F. P. C.*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied*, 377 U. S. 963; *Delta Air Lines, Inc. v. CAB*, 280 F. 2d 636, 640 (D. C. Cir. 1960), *cert. denied*, 364 U. S. 870; *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962).

The precise question of the substantive impact of procedural delay in § 7 proceedings has been considered several times by the courts of appeals. They have been unanimous in holding that Congress gave the Commission power to protect the consumer through recapture of overcharges (with interest) whenever the fact of procedural delay would have the substantive effect of depriving the consumer of full protection from excess rates for any substantial period while litigation of the initial price issue was pending —either on remand or as the result of the *ex parte* issuance of temporary certificates. In *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), (*"Skelly"*), the court specifically rejected, in the context of temporary certificates, the very interpretation of the Act urged by ODECO at pp. 9-12 of its brief. It clarified Judge Skelly Wright's language in the earlier *Atlantic* case,[2] relied on by ODECO, as follows:

> "Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory powers. As to this we may say initially that our statement in Atlantic Ref. Co. v. F. P. C., 115 U. S. App. D. C. 26, 316 F. 2d 677, 679 (1963), that there is no mechanism for refund of overcharges under Section 7 is not a holding that a refund may never be required when a permanent certificate takes over from a temporary one, an issue not there considered." (pp. 248-49)

2. *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963).

and held:

> "As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed." (p. 250)

Thus the court confirmed the Commission's power under § 7 to order refunds as a means of protecting the consumer from Commission error committed at an early stage of its determination under § 7 of the Act. Such a construction of the Commission's conditioning power under § 7 is in accord with decisions of this Court in analogous areas giving broad practical scope to the Commission's authority. *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378 (initial price); *FPC v. Hunt*, 376 U. S. 515 (moratorium); *cf. FPC v. Texaco*, 377 U. S. 33 (indefinite escalation provisions).

In *Hunt Oil Co. v. FPC*, 334 F. 2d 474 (5th Cir. 1964), the Fifth Circuit affirmed an order of the Commission imposing a refund obligation under § 7 upon the producer-applicant there involved. That case followed a court reversal of an earlier Commission order, similar to those in the present case, reached in a proceeding from which the Public Service Commission of New York had been excluded as an intervenor. On remand the Commission vacated the permanent certificates issued in the proceeding from which the Public Service Commission was excluded and issued in their place temporary certificates containing a refund obligation. This action was challenged by the producer, but, affirming the Commission action, the court held:

> "The Supreme Court, in Federal Power Commission v. H. L. Hunt et al., *supra*, clearly indicates that the Commission's authority in issuing temporary certificates is broad enough to subject such certificates to any reasonable condition to protect the public inter-

est. Certainly the refund provision in the temporary certificates in suit is such a condition. Actually, as in CATCO, 27 FPC 96 (1962), *the Commission,* by declaring the original § 7 certificate void *ab initio, might have imposed a refund obligation back to the date of the initial deliveries.* Instead, the Commission here merely treated the certificates as voidable and vacated them, thus limiting the refund in the temporary certificates to the date of their authorization, November 2 ,1961." (Emphasis added.) (p. 479)

In *Texaco Inc. v. FPC,* 290 F. 2d 149 (5th Cir. 1961), the court was faced with a challenge to the Commission's ordering of interest on certain refunds. The court held:

> "We also conclude that the Commission was fully authorized, when ordering a refund under the terms of the condition, to require payment of interest at 6 percent. See Mississippi River Fuel Corp. v. F. P. C., 108 U. S. App. D. C. 284, 281 F. 2d 919. Any other holding would, it seems to us, validate a retention of funds by the producer in a manner that would amount to unjust enrichment." (p. 157)

The decision of the court below that the Commission has power to protect the consumer from past error, corrected through court review, by conditioning certificates on the refund of overcharges, was directly in line with these decisions and must be affirmed. To hold otherwise would give ODECO not only the full benefit of the Commission's earlier error—"unjust enrichment"—but confer on it a complete exemption from regulation for a period of some five years.[3] Congress clearly did not intend such a result.

The Commission's power, discused above and upheld by the courts, to protect consumers during the procedural interval in which prior error in a § 7 proceeding is corrected, is entirely different from the power to order reparations of effective rates no longer subject to correction under

3. The Commission's original Opinion 327 unconditionally certificated ODECO's application as proposed.

§ 19 of the Act which are later found to be excessive, in independent Commission proceedings under §§ 4 or 5. The Commission sets forth this distinction in *Catco*-on-remand, 27 FPC 96, 592, at 596 (1962), a case in which it made effective the consumer protection required by this Court and which it followed in the proceeding below. It there said:

> "We are not awarding reparations, in the sense of investigating an effective rate, finding it unlawfully high and ordering a refund; we are reissuing a certificate of public convenience and necessity in place of the certificate issued in June 1957, but with a price condition which in our opinion is consistent with the mandate of the Supreme Court."

ODECO in 1959 was not, like an existing transit or power utility, performing a service at a given rate which the Commission changed as the result of a new, independent rate investigation proceeding. Rather, ODECO was offered a certificate before it began any service. Thereafter, although it knew the certificate was not final under § 19 and was subject to review and vacation, and although its contract with Hope permitted it to await a final certificate,[4] no longer subject to court review, it began service for its own private business reasons. In other words, even though ODECO had been issued a permanent certificate it had *no* obligation to perform thereunder if such certificate might be upset on appeal. Such a situation is entirely different from that of a telephone company, for example, which is allowed a new rate increase. The telephone company *does* have the continuing duty to render telephone service, even

4. Petitioner in No. 26 has failed to include in the joint appendix which constitutes the record before this Court data relating specifically to its own operations or contractual arrangements. However, ODECO's contract with Hope may be presumed to be typical of similar contracts (see, *e.g.*, R. 75), giving ODECO an absolute right to cancel its obligations to Hope if it failed to obtain a final, nonappealable certificate by the middle of 1959. The brief of the Government at p. 50 in Nos. 21, 22, 26 and 32 confirms this presumption of typicalness.

if its current tariff is not final because of a timely review in an appeals court. By beginning service herein ODECO voluntarily subjected itself, at the least, to "any reasonable conditions" to its interstate sale which the Commission might in its discretion impose in conformity with the Act and the opinion of the remanding Court of Appeals.

CONCLUSION.

For the foregoing reasons this Court should affirm the holding of the court below that the Commission has power to order refund of excesses collected under certificates reversed on timely appeal to the courts.

Respectfully submitted,

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